

No. 88-305

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF SOUTH CAROLINA,
Petitioner,

versus

DEMETRIUS GATHERS,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
SOUTH CAROLINA

REPLY BRIEF FOR PETITIONER

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I.

The introduction and comment on evidence of the victim's characteristics do not violate the Eighth Amendment.

The Respondents and amici in their support contend that a victim's personal characteristics are not a consequence of the murder and fail to illuminate the defendant's personal responsibility or moral guilt. (Brief of Respondent, p. 18). We strongly disagree. The extent of harm caused by the defendant's act includes necessarily the information about a victim which was introduced and commented upon in this case. The fact that many jurors will look less favorably on a capital defendant when they appreciate the full extent of the harm caused to the victim and his family does not make its introduction "arbitrary," but instead makes the decision "individualized." Here, the

prosecution had a legitimate interest in counteracting the open-ended mitigating evidence the defendant was entitled to introduce by its argument based upon evidence the jury had before it which presented a true picture of the crime and the victim. Cf. Eddings v. Oklahoma, 455 U.S. 104 (1982). There is nothing arbitrary by reminding a sentencer that "just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." Booth v. Maryland, 482 U.S. ___, 107 S.Ct. 2529, 2540 (White, J., dissenting).

II.

The Respondent's concerns about the introduction of this evidence are not supported by the record.

The Respondent and its amici express undue concern about problems arising from a defendant's rebuttal of victim character evidence. Their positions are speculative and unconnected to the facts of this case where no attempt was made to rebut this evidence. Defense counsel instead agreed with the presented facts of the victim's physical and mental status which were reasonable and foreseeable characteristics and consequences of the harm done by Gathers.

In Booth, supra, the majority expressed a concern that the introduction of victim evidence would cause the decisions to turn on whether the victims are assets to the community or sterling members of the community. This case stands for the proposition that the concerns are not realistic. The state's argument and position was

that our system of justice does not tolerate the distinctions. Here, the victim was not characterized as a sterling member of society but rather a member of society who had some mental problems who deserved equal and fair treatment from all its members. The evidence simply does not lead to the arbitrariness this Court previously associated with it. See Booth, supra, 96 L.Ed.2d 450, n. 8.

The Court's concern with a battle over the comparative social worth of a victim did not occur in this case. The fact that a victim was a non-violent person was a relevant factor when statutory mitigating circumstances exist in South Carolina law that "the victim was a participant in the defendant's conduct or consented to the act" or "the defendant was provoked by the victim into committing the murder." S.C. CODE

ANN. § 16-3-20 (C)(b)(3), (8) (1976).

Clearly, evidence that could rebut such circumstances should be admissible so that the jury renders an informed or guided decision that speaks the truth.

The amount of harm one causes should bear upon a defendant's personal responsibility for the acts. A reasoned decision maker should have the opportunity to view the full picture of the event before it makes its sentencing decision. The justice system, which requires all mitigating factors presented by the defendant but silencing the evidence of human suffering and preventing a quick glimpse of the life the defendant chose to extinguish, does not allow for a balanced view of the crime. "The decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief

that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death." Gregg v. Georgia, 428 U.S. 153, 184 (1976) (opinion of Stewart, Powell and Stevens, JJ.). To hold that the jury is precluded from learning who the victim was and what factors put him in a position in which he suffered from the brutality that occurred here does not find support in the Eighth Amendment. The victim did not ask to be murdered in a brutal fashion by the defendant that led to the defendant's trial of his moral responsibility. The defendant is entitled to present the decision maker with his reasons in mitigation as to why he committed the heinous act. The victim, through the prosecution, should equally be allowed to present his reasons through his own individualized

characteristics as to why he ended up being in the status of being victimized on that day. To erase the victim from the transcripts does not lead to a reasoned decision; to include the victim in the record does not lead to an arbitrary decision.

III.

The Respondent misinterprets the effect of the lower court's decision in State v. Gaskins.

The Respondent contends that State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985), precludes any testimony concerning a victim's characteristics from being introduced and would preclude the opportunity to rebut such a presentation. A close reading of the Gaskins decision does not support the broad proposition that the Respondent asserts. That case arose from a unique murder situation in which Gaskins, an

inmate, killed Rudolph Tyner, another inmate, by use of an exploding device on South Carolina's Death Row. Testimony was presented to the jury that Tyner had been sentenced to death for murdering the mother and step-father of Tony Cimo who contacted Gaskins concerning murdering Tyner. At trial, guilt phase evidence had already been introduced about the victim's status as a convicted murderer on death row and the crime including the tape recording wherein Gaskins described Tyner's apparent lack of remorse over the crime when he laughed about killing Cimo's mother and wanting to leave no witnesses. (State v. Gaskins, Tr. pp. 4515-4517). In the penalty phase, Gaskins' counsel sought to introduce Tyner's confession to the earlier murders in mitigation "to show the influence that was placed on Mr. Gaskins and the pressure placed ..."

allegedly as an attempt to establish a different motive for the murder than that the murder was for money, i.e., to aid Tony Cimo in his apparent efforts to end Mr. Tyner's life. Brief of Appellant, State v. Gaskins, pp. 87-88. The trial court therein refused to allow the collateral statement to be introduced but stated:

The Court: This gentleman can testify that Mr. Cimo was upset over his parents being gunned down by Mr. Tyner in an armed robbery in Horry County.

(State v. Gaskins, Tr. p. 4364). In mitigation, the defense presented admitted testimony that Tyner was arrested and convicted of the murder of Mr. and Mrs. Moon and that Tony Cimo was distraught over what happened to his parents. (State v. Gaskins, Tr. pp. 4365-4367). Further, during the closing arguments in that case, defense counsel argued that the death penalty was not

appropriate and there was "no excuse for the death of Mr. and Mrs. Moon" nor appropriate on "Tony Cimo who is trying to avenge the death of his parents."

(State v. Gaskins, Tr. p. 4399, 4402).

See also State v. Gaskins, Tr. p. 4139

(guilt-phase argument of defense commenting on Tyner's "slaughter" of two old people with a shotgun and "awaiting to die in the electric chair"). Faced with those factual circumstances, the South Carolina Supreme Court made the following findings of fact and conclusions:

At the sentencing phase of the trial, Gaskins' counsel offered in evidence a confession given by Tyner to the effect that he killed Mr. and Mrs. Moon. The confession was not allowed. It is submitted that this confession should have been admitted as a mitigating circumstance. Apparently the gist of the argument is that if he could show that Tyner should have died because of his treatment of the Moons, it would justify

to some degree Gaskins' execution of him. Obviously, the jurors knew that the State of South Carolina had determined that Tyner should be executed. Nothing Gaskins could prove would more conclusively show that Tyner was culpable. Be that as it may, Tyner was entitled to live until the State of South Carolina carried out the order of execution. The fact that the State had conclusively found that Tyner should be executed did not entitle Gaskins to kill him. We find no error in excluding Tyner's confession.

State v. Gaskins, supra, 326 S.E.2d at 145.

Contrary to the position espoused by the Respondent, the South Carolina Supreme Court's opinion in Gaskins did not preclude the defense from challenging the evidence about the victim present in the record. In Gaskins, the defense was merely precluded from introducing additional evidence of a confession to an earlier murder by the victim, where the

uncontradicted evidence in the record was that the victim killed those two individuals and the state had decided that the victim should be executed. As the state court correctly stated: "nothing Gaskins could prove would more conclusively show that Tyner was culpable." Further, the Court properly stated that the fact that Tyner had received the death penalty did not "entitle Gaskins to kill him." The state court simply found as a matter of law that the confession of Tyner to the Moon murders was not itself a mitigating circumstance.

In State v. Bell, 293 S.C. 391, 360 S.E.2d 706 (1987), the state court rejected any applicability of Gaskins where references of the victim's lifestyle were directly related to competent relevant testimony concerning the crime and the facts were critical

for the jury's understanding as to why the victim was in the various places she was on the day of her abduction.

Clearly, this testimony and comment were admissible under any appropriate Eighth Amendment analysis, including Booth and the Gaskins decision was not a similar situation.

It has been asserted that South Carolina law did not allow the defense to rebut the evidence presented by the defendant. Nowhere in this record was any such rebuttal evidence sought to be introduced nor was any such proffer made. The assertions that he was not permitted to explain or rebut these facts as presented at trial is simply not true. The fallacy of the Respondent's argument stands out when the trial reveals no objection to the evidence when it was introduced in the guilt phase of the trial. Similarly,

the state's guilt phase theory of the case was cogently set forth in the strikingly similar closing argument in the guilt phase. (Tr. pp. 1032-1056). Therein he also described the vicious assault on the victim, described his personal belongings and what Gathers maliciously did to them. (Tr. pp. 1053-1054). Importantly, in the guilt phase closing argument, he pointed out the testimony concerning the mental problems of the victim and that he was not a violent person and "if he were, you would hear lots about that" (Tr. p. 1051). Again, he described that the victim was a religious person, and his Bible, rosary beads, and statues of angels were on the scene of the murder. (Tr. pp. 1051-1052). As in the penalty phase, he described the purpose of the park and the degradation and humiliation of the victim, "a very, very small

person," suffering in pain from the assault while "they go through his belongings, his Bible, his religious papers, looking for things to steal, throwing them along the bike path." (Tr. p. 1054). At the outset of the guilt phase argument, rather than challenging these concerns, the defense counsel endorses them expressing sympathy for the mentally ill and the victim who "is helpless in every way, physically overwhelmed, and mentally handicapped, he had his problems, there is sympathy in this case for only one man, and that's Ricky Haynes." (Tr. p. 1057). No issue was raised concerning these strikingly similar portions of the guilt phase argument in the lower court, which found no error in the Solicitor's argument against other challenges or the admission of that evidence in the guilt phase. (J.A. pp. 60-61).

Contrary to the assertions, the State Supreme Court never held that this evidence was not admissible as a circumstance of the crime, but rather held the extensive comments about the victim's character were unnecessary to an understanding of the crime. (J.A. p. 66). His assertions to the contrary do not withstand close scrutiny.

IV.

The Solicitor's argument properly presented his version of the evidence presented at trial.

The Respondent's contention that the Solicitor misrepresented the evidence in his closing argument is not supported by the evidence in the record. In its Brief, the Respondent contends that there was no evidence that Reverend Minister Haynes resembled the protagonist in the "Game Guy's Prayer"

or his philosophy for dealing with life. (Brief of Respondent, pp. 25-27).

Contrary to these assertions, the evidence in the record below strongly supports the reasonable inferences presented in the Solicitor's closing argument.

While the Petitioner recognizes the apparent unwillingness of the Respondent to concede this point, the evidence of the crime screams out in support of the argument. Actions of the victim emit volumes in support of his status on the evening of his murder, where unarmed he went to the park alone and sat on the park bench with his personal belongings, including his religious items. (J.A. pp. 26-27). While there, he again reflected his openness, yet vulnerable stature by changing his clothes in the park. (J.A. pp. 17, 32). It also reflects his unsuccessful attempt to

defend himself until he was pinned to the ground. (J.A. pp. 19-21). The record before the Court, information evident to Gathers who rummaged through the items and talked to the victim, supports the inferences asserted in the argument. This was not an appeal to the jury that the sentence of death be imposed on the basis of race, religion, or political affiliation. Zant v. Stephens, 462 U.S. 862, 888 (1983).

Instead, it was a statement that society and its members cannot tolerate the peaceful and lawful pursuits of any of its members, including the vulnerable, in our public parks being destroyed by the brutality of violent individuals intent on making the park their own domain.

CONCLUSION

For the foregoing reasons, and for those set forth in Petitioner's opening

Brief, the judgment of the South
Carolina Supreme Court should be
reversed.

Respectfully submitted,

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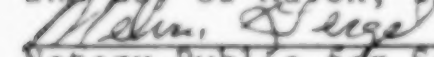
AFFIDAVIT OF FILING

PERSONALLY appeared before me,
Donald J. Zelenka, who being duly sworn,
deposes and says that he is a member of
the Bar of this Court and that on this
date he filed the original and forty
copies of the Reply Brief for Petitioner
in the above captioned case by
depositing same with Federal Express,
prepaid, and properly addressed to the
Clerk of this Court.

This 2nd day of March, 1989.


Donald J. Zelenka

SWORN to before me this
2nd day of March, 1989.

 (LS)
Notary Public for South Carolina
My Commission Expires: July 1989

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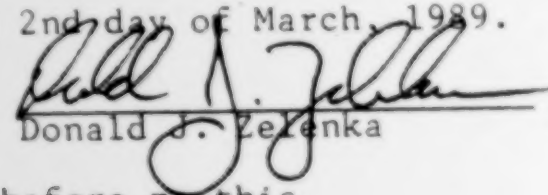
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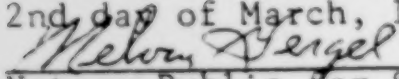
AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Donald J. Zelenka, who being duly sworn, deposes and says that he served the foregoing Reply Brief for Petitioner on the Respondent by depositing three copies of the same in the United States Mail, first class postage prepaid, and addressed to Joseph L. Savitz, III, Esquire, 1122 Lady Street, Suite 301, Columbia, South Carolina 29201. He further certifies that all parties required to be served have been served.

This 2nd day of March, 1989.


Donald J. Zelenka

SWORN to before me this
2nd day of March, 1989.

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Notary Public for South Carolina
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